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## The Teachers' Strike of 2018 in Historical Perspective

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# THE TEACHERS' STRIKE OF 2018 IN HISTORICAL PERSPECTIVE

Joseph Slater\*

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## I. INTRODUCTION

The wave of teachers' strikes that began in the spring of 2018 and have continued into 2019<sup>1</sup> is one of the most impressive examples of labor militancy in at least the past half century. The strikes are remarkable in their number, coming as they do in a period of declining strike rates in the U.S.<sup>2</sup> They are stunning in their level of success, especially compared to the results of other famous strikes by public-sector unions such as the PATCO strike of the 1981, the New York Transit Workers of 2005, and the Hortonville teachers' strike of 1974.<sup>3</sup> And they are fascinating in that the spring 2018 strikes took place in states which not only barred strikes by any public employees, but also did not authorize collective bargaining for any public employees.<sup>4</sup>

Successful teacher union activism is not new. In 1916, *Fursman v. Chicago*<sup>5</sup> upheld a rule that barred Chicago teachers from membership in the American Federation of Teachers (AFT).<sup>6</sup> Yet after several years of political activism, the AFT was able to get the rule repealed.<sup>7</sup> Throughout the twentieth century, both the AFT and the National Education Association

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1. Since the strikes of spring 2018 that are the main subject of this essay, charter school teachers in Chicago and Parma, Ohio have gone on a successful strikes, as have public-school teachers in Los Angeles. See Jennifer Medina & Dana Goldstein, *Success of Los Angeles Teachers Strike Rocks Charter Schools, and a Rich Supporter*, N.Y. TIMES (Jan. 28, 2019), <https://www.nytimes.com/2019/01/28/us/charter-schools-los-angeles.html>; Patrick O'Donnell, *Teachers OK Contract to End Strike at Summit Academy Charter School in Parma*, CLEVELAND PLAIN DEALER (March 1, 2019), <https://www.cleveland.com/metro/2019/03/teachers-ok-contract-to-end-strike-at-summit-academy-charter-school-in-parma.html>.

2. Abigail Abrams, *The Number of U.S. Workers Involved in a Strike in 2018 Was the Highest Since 1986*, TIME (Feb. 8, 2019), <http://time.com/5525512/american-workers-strikes-bureau-labor-statistics/>.

3. See *infra* for discussions of these strikes.

4. The strikes took place in Arizona, Colorado, Kentucky, North Carolina, Oklahoma, and West Virginia. Abrams, *supra* note 2. None of these states grant collective bargaining rights to teachers. RICHARD KEARNEY & PATRICE MARESCAL, LABOR RELATIONS IN THE PUBLIC SECTOR 64-65 (5th ed. 2014). Strikes by any public employee are illegal in almost all these states. *Id.* at 245-46.

5. *Fursman v. Chicago*, 278 Ill. 318, 116 N.E. 158 (1917) (reasoning the Chicago School Board had the right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all).

6. *Id.* at 325-26, 116 N.E. at 160.

7. JOSEPH SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962 41 (2004).

(NEA) represented teachers in a variety of ways: lobbying for civil service and tenure laws; representing teachers under such laws; forging informal agreements with employers over wages, hours, and working conditions; and, in the later decades of the twentieth century, engaging in formal collective bargaining and even striking.<sup>8</sup>

These activities are, of course, what unions are known for. Crucially, though, teachers' unions have engaged in these activities under the umbrella of public-sector labor laws, laws that have always been significantly more restrictive than the laws that govern unions in the private sector. Most private-sector workers are governed by the National Labor Relations Act (NLRA)<sup>9</sup> or the Railway Labor Act (RLA).<sup>10</sup> These federal statutes, passed in 1935 and 1926 respectively, provide, at least on paper, a relatively robust right to bargain collectively and to strike.<sup>11</sup> Public-sector labor law, however, is generally a matter of state or even local government law. While public-sector laws vary tremendously, a clear majority of them bar strikes by all public employees.<sup>12</sup> A significant minority of states do not even authorize collective bargaining by most or even any public employees.<sup>13</sup> Public-sector laws were also enacted significantly later than private-sector laws. The first public-sector laws were enacted in the 1960s, and a number were enacted in the 1980s or later.<sup>14</sup> Further, in the twenty-first century, laws granting rights to public-sector unions have been under attack. These attacks include, but are not limited to, Act 10 in Wisconsin (practically eliminating collective bargaining rights for all public employees not in "protective services");<sup>15</sup> a similar repeal of rights in Iowa;<sup>16</sup> and the *Janus* decision,<sup>17</sup> which held that any union security

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8. See SLATER, *supra* note 7, at 39-96.

9. 29 U.S.C. §§ 151-169 (2019).

10. 45 U.S.C. §§ 151 et seq (2019).

11. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935); Railway Labor Act, 44 Stat. 577 (1926).

12. See generally SETH HARRIS ET AL., MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS 811 (2d ed. 2016).

13. KEARNEY & MARESCHAL, *supra* note 4, at 64-65. Strikes by any public employee are illegal in all these states. *Id.* at 245-46.

14. HARRIS ET AL., *supra* note 12, at 55.

15. See HARRIS ET AL., *supra* note 12, at 73-75.

16. In 2017, Iowa enacted House File 291, which is largely modeled after Wisconsin Act 10. H.F. 291, 87<sup>th</sup> Gen. Assemb., Reg. Sess. (Ia. 2017) (enacted), <https://www.legis.iowa.gov/legislation/BillBook?ba=HF291&ga=87>.

17. *Janus v. AFSCME Council 31*, 138 S.Ct. 2448 (2018).

clause that obligated a member of a union bargaining unit to pay any dues to help defray representation costs the union was obligated to provide violated the First Amendment.<sup>18</sup>

In this climate, teachers struck in states where they had no right to bargain collectively, much less strike. The relevant government employers and officials had no obligation to engage in any negotiations with them, and indeed could have fired all of them for striking.<sup>19</sup> That they actually gave in to teacher demands and did not fire anyone demonstrates that practical realities may outweigh legal rights in some labor relations. Still, illegal strikes remain fraught with risks for employees, and one can simultaneously admire the teachers' organizational skills and victories while wondering if periodic illegal wide-spread work stoppages are the optimal way to conduct labor relations on an ongoing basis.

This essay addresses the historical context of these strikes. First, it describes the historical background and evolution of the wildly inconsistent and often woefully inadequate public-sector labor laws in the U.S. It will describe how this regime evolved so differently than private-sector labor law in the U.S., and indeed differently than laws governing public-sector workers in comparable countries, where bargaining and strike rights for teachers are much more common.<sup>20</sup> Second, it gives some examples of how teachers' unions have dealt with severe legal restrictions on their activities in the past: sometimes not as successfully as recently. Finally, it will consider the consequences of the current legal regime for unions, employees, and employers going forward.

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18. *Id.* at 2460.

19. See Steven Greenhouse, *Making Teachers' Strikes Illegal Won't Stop Them*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/opinion/teacher-strikes-illegal-arizona-carolina.html>.

20. See generally REGULATING STRIKES IN ESSENTIAL SERVICES: A COMPARATIVE 'LAW IN ACTION' PERSPECTIVE (Moti Mironi & Monika Schlachter, eds., 2019) (covering relevant laws in the U.S. and thirteen other countries) [hereinafter REGULATING STRIKES].

## II. HISTORY OF THE RIGHTS TO BARGAIN AND STRIKE IN THE PUBLIC SECTOR

### A. *The Pre-Collective Bargaining Era*

Strikes by public employees were illegal everywhere in the U.S. until the 1970s, when a few states authorized them in limited circumstances.<sup>21</sup> Even today, only a dozen states make any strikes by any type of public employee legal in any circumstances.<sup>22</sup> On the other hand, a majority of states currently authorize some form of collective bargaining for at least some public employees, including teachers.<sup>23</sup> Thus, in a majority of states, teachers (and other public employees) have a legal right to bargain collectively, but no legal right to strike. Instead, public-sector labor laws contain various, but at least somewhat standardized, alternative methods for resolving bargaining impasses, using combinations of mediation, “fact-finding” and various types of interest arbitration.<sup>24</sup> But even today, eight U.S. states do not permit any public employees to bargain collectively, and around a dozen more only let one-to-four categories of public employees bargain collectively.<sup>25</sup>

This is not “natural,” in that most other first world countries have much more robust bargaining and strike rights for teachers and most other public employees.<sup>26</sup> Why did labor laws governing public employees develop so differently in the U.S. than elsewhere, with legal rights for public-sector unions coming much later and often in a much more limited fashion than rights for private-sector employees?

The first reason is the Boston police strike of 1919.<sup>27</sup> While public workers had no rights to organize or bargain, much less strike, at that time, some government employees had organized into unions as early as the 1830s.<sup>28</sup> By the second decade of the

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21. HARRIS ET AL., *supra* note 12, at 941.

22. KEARNEY & MARESCHAL, *supra* note 4, at 245-46.

23. KEARNEY & MARESCHAL, *supra* note 4, at 64-65.

24. *See* HARRIS ET AL., *supra* note 12, at 891-940.

25. KEARNEY & MARESCHAL, *supra* note 4, at 65-66, 245-46, 269-70.

26. *See* Joseph Slater, *United States*, in *REGULATING STRIKES*, *supra* note 20, at 477-513.

27. *REGULATING STRIKES*, *supra* note 20, at 479-80; *see generally* SLATER, *supra* note 4, at 13-38.

28. *REGULATING STRIKES*, *supra* note 20, at 479-80.

twentieth century, levels of public-sector unionization were starting to rise.<sup>29</sup> Several major public-sector unions (including but not limited to the American Federation of Teachers) formed and/or affiliated with the American Federation of Labor (AFL). In 1919, the AFL began chartering police unions; this prompted intense opposition from public and private employers.<sup>30</sup> After Boston police officers formed an AFL-affiliated union, the local police commissioner barred such affiliation.<sup>31</sup> Police union leaders refused to leave the AFL; the commissioner suspended several of them; and in response, almost all police officers in Boston went on an illegal strike in September 1919.<sup>32</sup> For a few days, Boston suffered lawlessness and some deaths related to the strike.<sup>33</sup>

The aftermath of the strike hurt public-sector unions for decades. Many local governments barred *any* public employees from affiliating with the AFL.<sup>34</sup> For example, Seattle required public-school teachers to sign “yellow dog”<sup>35</sup> contracts stating the teacher would not join a union while employed as a teacher.<sup>36</sup> Courts upheld such bans until the late 1960s.<sup>37</sup> The union density rate in the public sector fell in the 1920s, and for many decades to come, union opponents invoked the Boston strike to oppose any proposal that any type of public employee should have the right to bargain collectively.<sup>38</sup>

Apart from the Boston strike, Constitutional law and the highly subdivided nature of government in the U.S. helped prevent public employees from winning bargaining and strike rights. First, in the New Deal era and beyond, the Tenth

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29. REGULATING STRIKES, *supra* note 20, at 479-80.

30. REGULATING STRIKES, *supra* note 20, at 480.

31. REGULATING STRIKES, *supra* note 20, at 480.

32. REGULATING STRIKES, *supra* note 20, at 480.

33. REGULATING STRIKES, *supra* note 20, at 480; *see also* SLATER, *supra* note 7, at 13-38.

34. REGULATING STRIKES, *supra* note 20, at 480; *see also* SLATER, *supra* note 7, at 35-38.

35. Yellow dog contracts seek to reduce labor union participation by asking employees not to join a union or to resign if they are already a member. *Yellow Dog Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

36. SLATER, *supra* note 7, at 39-70.

37. HARRIS ET AL., *supra* note 12, at 58-63. *See, e.g.*, AFSCME Local 201 v. City of Muskegon, 369 Mich. 384, 120 N.W.2d 197 (1963) (upholding bar on police affiliating with the AFL).

38. REGULATING STRIKES, *supra* note 20, at 480; *see also* SLATER, *supra* note 7, at 13-38.

Amendment would have been a significant obstacle to a federal law regulating the labor relations of states and their subdivisions. It was not until the 1980s that the Supreme Court held that the Tenth Amendment did not bar application of the Fair Labor Standards Act to states and their subdivisions.<sup>39</sup> Further, counties, cities, and even political subdivisions of cities such as school boards, had significant political independence, and political leaders of such entities, *e.g.* school boards, opposed giving their employees collective bargaining rights.<sup>40</sup>

With no statutes giving rights to public-sector unions, state courts made the “common law” of public-sector labor law, and these courts were quite deferential to arguments public officials made that unionization of their workers was harmful. Also, in the mid-20<sup>th</sup> century, some courts relied on the “non-delegation doctrine”<sup>41</sup> to hold that even *voluntary* collective bargaining by public employers was an unconstitutional delegation of public power (*e.g.*, to set wages of public employees) to a private party (a union).<sup>42</sup>

Further, even though after the Boston police strike through the early 1960s, public-sector unions effectively renounced the strike weapon, judges still routinely upheld bars on public-sector workers merely belonging to unions, reasoning that membership would inevitably lead to strikes. Judges could not conceive of labor relations that did not involve strikes. The fact that public-sector unions from the 1920s through the 1950s rarely actually struck did not matter.<sup>43</sup>

### ***B. The Era of Public Sector Collective Bargaining Begins in the 1960s***

The first public-sector labor law was passed in Wisconsin in

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39. See *Garcia v. San Antonio Metro. Transp. Auth.*, 469 U.S. 528 (1985).

40. See generally Joseph Slater, *United States*, in *REGULATING STRIKES*, *supra* note 20.

41. “The non-delegation doctrine is a principle in administrative law that Congress cannot delegate its legislative powers to other entities. This prohibition typically involves Congress delegating its powers to administrative agencies or to private organizations.” *Nondelegation Doctrine*, WEX LEGAL DICTIONARY, [https://www.law.cornell.edu/wex/nondelegation\\_doctrine](https://www.law.cornell.edu/wex/nondelegation_doctrine) (last visited June 6, 2019).

42. SLATER, *supra* note 7, at 71-96.

43. See generally Joseph Slater, *The Court Does Not Know “What a Labor Union is”: How State Structures and Judicial (Mis)Constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981 (2000).



1959, and then amended in 1962.<sup>44</sup> This event is also important because of how it dealt with the strike issue. Proponents of public-sector collective bargaining in Wisconsin began attempting to pass such a law in 1951, but progress stalled, often over a question that remains central in current public-sector labor law. Assuming public-sector unions are not allowed to strike, how can bargaining impasses be resolved? The Wisconsin law finally passed with forms of mediation substituted for strikes.<sup>45</sup> In subsequent decades, states would develop further alternatives to resolve bargaining impasses, notably “fact-finding” and “interest arbitration,” discussed below.

The Wisconsin law was the beginning of a national trend. Federal employees won a limited right to bargain collectively in 1962, when President Kennedy issued Executive Order 10988.<sup>46</sup> By 1966, sixteen states had enacted laws granting organizing and bargaining rights to at least some public workers.<sup>47</sup> By the end of the 1970s, a majority of states had adopted such laws. Public-sector unionization increased rapidly as well.<sup>48</sup> In 1955, all the public-sector unions put together had a combined membership of around 400,000; by the 1970s, the total was more than 4,000,000.<sup>49</sup> By 1975, the union density rate in the public sector equaled that of the private sector (around 25 percent).<sup>50</sup> The public-sector rate then increased to about 38 percent in 1979, and has stayed around that level ever since.<sup>51</sup>

Also, in the late 1960s, courts held for the first time that the First Amendment prevents a public employer from firing or otherwise discriminating against a public employee because of union activities.<sup>52</sup> This was a major departure from cases in the first half of the twentieth century, and it put an end to “yellow

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44. See SLATER, *supra* note 7, at 158-92; see generally Paul Moreno, *The History of Public-Sector Unionism* (2011) (Hillsdale College), <https://www.hillsdale.edu/wp-content/uploads/2016/02/FMF-2011-The-History-of-Public-Sector-Unionism.pdf>.

45. For more details on this, see SLATER, *supra* note 7, at 158-92.

46. Exec. Order No. 10,988, 3 C.F.R. § 521 (1962).

47. SLATER, *supra* note 7, at 191.

48. SLATER, *supra* note 7, at 191-93.

49. SLATER, *supra* note 7, at 193; see *AFSCME: 75 Years of History*, <https://www.afscme.org/union/history/afscme-75-years-of-history> (last visited June 6, 2019).

50. Henry Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors*, Working Paper #503, Princeton University Industrial Relations Section (2005), <http://harris.princeton.edu/pubs/pdfs/503.pdf>.

51. *Id.*

52. HARRIS ET AL., *supra* note 12, at 65.

dog” contracts and other bans on union membership in the public sector that were common through the early 1960s. However, this constitutional right has never included the right to bargain collectively or the right to strike.<sup>53</sup>

The 1960s and 1970s was a period of relative militancy for many public-sector unions, especially teachers (although nothing approaching the rate of strikes in the private sector in that era). The 1980s and beyond has seen a steep decline in public-sector strike rates.<sup>54</sup> For example, there were many more strikes in the public sector in the state of Ohio in the period of 1974-79 (282) than in the longer period of 1984-1992 (110).<sup>55</sup> The even longer period of 2000-10 saw even fewer strikes (43).<sup>56</sup> Significantly, the low strike rates in the public sector persisted even in states which made strikes by most public employees legal, such as Ohio.<sup>57</sup> This is due in large part to the alternative impasse resolution mechanisms discussed further below.

Before the teachers' strikes of 2018, the most famous strike by public workers in the 1980s and after was conducted by federal air traffic controllers (PATCO, the Professional Air Traffic Controllers Union) in 1981.<sup>58</sup> That strike was soundly defeated. PATCO was decertified, all the strikers lost their jobs, and some were actually jailed under provisions of federal law which make strikes against the federal government a crime.<sup>59</sup> Public transport workers struck in New York City in 2005, and that strike also did not end well for the union, featuring, among other things, an injunction, crippling fines, and a forfeiture of the right to use dues check-off.<sup>60</sup>

In sum, today, states use one of three models for public employees such as teachers: (a) such employees have no legal

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53. HARRIS ET AL., *supra* note 12, at 65-71.

54. MARTIN MALIN ET AL., *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS* 367 (3d ed. 2016).

55. Joseph Slater, *The Rise and Fall of SB-5: The Rejection of an Anti-Union Law in Historical and Political Context*, 43 U. TOLEDO L. REV. 473, 480-81 (2012).

56. *Id.* While Ohio is one of the states that permit some public employees to strike, that rule was not enacted until 1983, so the public-sector strike rate in that state was highest when all such strikes were illegal. *Id.*

57. *Id.*

58. See Greenhouse, *supra* note 19.

59. For a detailed description of this strike, see JOSEPH MCCARTIN, *COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA* (2011).

60. See HARRIS ET AL., *supra* note 12, at 874-84 (collecting cases).

right to bargain or strike (a minority approach); (b) such employees have a right to bargain, and some have a legal right to strike (another minority approach); and (c) such employees have a right to bargain collectively but no right to strike (the plurality approach).

This legal structure is unusual. The U.S. does not follow international law or practices regarding strike rights or collective bargaining rights for public workers.<sup>61</sup> Indeed, in 2007, in response to a complaint by a union, the International Labor Organization (ILO) called on North Carolina to repeal its statutory ban on all collective bargaining in the public sector in that state.<sup>62</sup>

Further, again, all the states in which teachers struck in the spring of 2018 were states in which teachers had neither the right to strike nor the right to bargain collectively. This is a minority approach today, and in some ways, it was as if these strikes had taken place in the past.

### III. TEACHER STRIKES IN THE PAST

For most of the period after the Boston police strike until the 1960s, teachers and other public employees generally refrained from striking.<sup>63</sup> This does not mean teachers' unions were inactive. For example, the relatively large Chicago Teachers Union in this era fought for civil service rules and against patronage, engaged in political activities, and won one of the first teacher salary schedules not segregated by sex.<sup>64</sup> This was typical for public-sector unions in this era.<sup>65</sup>

There were some teacher strikes in this period, mostly in the 1940s. Teachers struck in twelve states in 1943 (winning

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61. For descriptions of legal rules and practices in a variety of other countries, see *REGULATING STRIKES*, *supra* note 20.

62. MALIN ET AL., *supra* note 54, at 418-19; see generally INTERNATIONAL LABOUR OFFICE, REPORTS OF THE COMMITTEE ON FREEDOM OF ASSOCIATION (2007), <http://southernworker.org/wp-content/uploads/downloads/2013/08/ILO-Decision-on-US-and-North-Carolina.pdf> containing the decision in Case No. 2460, Complaint against the Government of the United States by the United Electrical, Radio, and Machine Workers

63. SLATER, *supra* note 7, at 71-96.

64. Slater, *supra* note 7, at 41; see also John LYONS, *TEACHERS AND REFORM: CHICAGO PUBLIC EDUCATION, 1929-70* (2008).

65. SLATER, *supra* note 7, at 41, 71-96.

significant salary increases).<sup>66</sup> In 1946, teachers in Norwalk, Connecticut, St. Paul, Minnesota, and New Jersey successfully struck.<sup>67</sup> Teachers also struck successfully in Buffalo in 1946-47;<sup>68</sup> in Minneapolis, San Francisco, and Jersey City in 1948,<sup>69</sup> and in Providence, Rhode Island in 1950.<sup>70</sup> In the 1950s, however, teacher militancy was rare, outside New Jersey which saw nine strikes in that decade.<sup>71</sup>

The 1960s and 1970s, however, saw an explosion of teachers' strikes, mostly involving teachers affiliated with the AFT seeking recognition and labor contracts. New York City teachers, led by future AFT president Albert Shanker, engaged in a successful one-day strike in 1960.<sup>72</sup> In 1964, 300 AFT members in Louisville struck for higher pay.<sup>73</sup> In 1965, a third of the teachers in South Bend, Indiana struck for four days.<sup>74</sup> There were approximately 300 teachers' strikes in the 1960s, including more than 100 in 1967 alone.<sup>75</sup> These strikes were typically short: usually less than a week.<sup>76</sup> Pittsburgh teachers held an eleven-day strike in 1968.<sup>77</sup> Perhaps most famously, the United Federation of Teachers strike involving the Ocean Hill-Brownsville neighborhoods in Brooklyn created tensions between labor and civil rights groups.<sup>78</sup> In the 1975-76 school

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66. The Morning Delivery, *A Brief History of Teacher Strikes in the United States* (Sept. 12, 2012), available at: <https://www.wplucey.com/2012/09/a-short-history-of-teacher-strikes-in-the-united-states.html>.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. JON SHELTON, *TEACHER STRIKE!: PUBLIC EDUCATION AND THE MAKING OF A NEW AMERICAN POLITICAL ORDER* 33 (2017).

73. *Id.* at 34.

74. *Id.*

75. Jon Shelton, *Red State Strikes and the Roots of Teacher Militancy*, Labor and Working-Class History Association Newsletter 7 (Dec. 2018) [hereinafter *Red State Strikes*]; see also SHELTON, *supra* note 72, at 35.

76. *Red State Strikes*, *supra* note 54, at 7. For more details, see SHELTON, *supra* note 72, at 33-48.

77. For more details, see SHELTON, *supra* note 72, at 38-43.

78. See generally DENNIS GAFFNEY, *TEACHERS UNITED: THE RISE OF NEW YORK STATE UNITED TEACHERS* (2007); JERALD E. PODAIR, *THE STRIKE THAT CHANGED NEW YORK: BLACKS, WHITES, AND THE OCEAN HILL-BROWNSVILLE CRISIS* (2002); See also Dana Goldstein, *The Tough Lessons of the 1968 Teacher Strikes*, THE NATION (Sept. 24, 2014), <https://www.thenation.com/article/tough-lessons-1968-teacher-strikes/>.

year, there were over 200 teachers' strikes, including an illegal week-long strike in New York City protesting cuts in education funding.<sup>79</sup> The length of strikes increased in the 1970s.<sup>80</sup> For example, teachers in Newark struck for a month in 1970 and for three months in 1971.<sup>81</sup> In the 1972-73 school year, teachers in Philadelphia struck for nearly three months.<sup>82</sup> In 1979, St. Louis teachers struck for six weeks.<sup>83</sup>

The vast majority of these strikes were illegal.<sup>84</sup> Vermont had given municipal employees a limited right to strike in 1967, but beyond that, public employees, including teachers, had no legal right to strike in the 1960s.<sup>85</sup> In the 1970s, a few states legalized strikes. Pennsylvania granted a limited strike right to teachers and some other public employees in 1970.<sup>86</sup> Hawaii and Minnesota followed suit in 1970 and 1975, respectively.<sup>87</sup> In the 1980s, a few other states granted the right to strike, including Illinois and Ohio, both in 1983.<sup>88</sup> In the vast majority of states, however, teacher strikes remain illegal through today. Limited legal strike rights also did not guarantee success. In 1975-76, teachers struck in Pittsburgh, but that act was controversial, and the union did not achieve its goals.<sup>89</sup>

From the 1980s until 2018, teachers struck much less frequently.<sup>90</sup> By the first decade of the 21<sup>st</sup> century, there were only about a dozen teachers' strikes per year.<sup>91</sup> This is consistent with a general and precipitous drop in strike rates in the U.S. The Bureau of Labor Statistics lists the number of strikes in the U.S. that involved at least 1,000 workers.<sup>92</sup> In 1967, there were

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79. *Red State Strikes*, *supra* note 75, at 7.

80. *Red State Strikes*, *supra* note 75, at 7.

81. *Red State Strikes*, *supra* note 75, at 7.

82. *Red State Strikes*, *supra* note 75, at 7.

83. *Red State Strikes*, *supra* note 75, at 7.

84. See HARRIS ET AL., *supra* note 12, at 941.

85. HARRIS ET AL., *supra* note 12, at 941.

86. HARRIS ET AL., *supra* note 12, at 941.

87. HARRIS ET AL., *supra* note 12, at 941.

88. HARRIS ET AL., *supra* note 12, at 941.

89. For more details and debate regarding the strike, see SHELTON, *supra* note 72, at 143-59.

90. *Red State Strikes*, *supra* note 75, at 8.

91. *Red State Strikes*, *supra* note 75, at 8.

92. See BUREAU OF LABOR STATISTICS, *Table 1: Work stoppages involving 1,000 or more workers, 1947-2017* (Feb. 9, 2018), <https://www.bls.gov/news.release/wkstp.t01.htm>

381 such strikes;<sup>93</sup> in 1977, there were 298;<sup>94</sup> in 1987, there were 46;<sup>95</sup> in 1997, there were 29;<sup>96</sup> in 2007, there were 21;<sup>97</sup> and in 2017, there were 7.<sup>98</sup>

#### IV. THE 2018 STRIKES IN THE CONTEXT OF MODERN PUBLIC SECTOR LABOR LAW

While the teachers' strikes of 2018 took place under legal regimes more common in the first half of the 20<sup>th</sup> century, there were very modern reasons for the strikes. Total state and local funding to public education was lower in 2017 than in 2008 in thirty-six states;<sup>99</sup> 220,000 education jobs were cut in this period even as enrollments grew by over 1,000,000.<sup>100</sup> More specifically, funding for K-12 education on a per-pupil basis, adjusted for inflation, from 2008-17 dropped 26.91% in Oklahoma,<sup>101</sup> 13.11% in Kentucky,<sup>102</sup> 12.76% in Arizona,<sup>103</sup> 9.9% in North Carolina,<sup>104</sup> and 9.5% in West Virginia.<sup>105</sup>

While these cuts represent politics and priorities beyond labor law, it is useful to consider the alternatives labor law has created to deal with workplace issues. Because while some of the strikes described above ended relatively positively for the union, a number of illegal strikes ended very badly for unions and the communities they were in. For example, in 1971, in Reese, Michigan, teachers struck and the school district fired all forty-four of its teachers.<sup>106</sup> In 1974, in Dearborn Heights, Michigan,

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Joseph McCartin, *Introduction*, 15(4) LABOR: STUDIES IN WORKING CLASS HISTORY 93, 94 (2018).

100. *Id.*

101. Michael Leachman, *State K-12 Funding Still Lacking in Many States*, CTR. ON BUDGET AND POL. PRIORITIES (Oct. 20, 2016), <https://www.cbpp.org/blog/state-k-12-funding-still-lagging-in-many-states> (click on Oklahoma in interactive map to display percentages).

102. *Id.* (click on Kentucky in the interactive map to display percentages).

103. *Id.* (click on Arizona in the interactive map to display percentages).

104. *Id.* (click on North Carolina in the interactive map to display percentages).

105. *Id.* (click on West Virginia in the interactive map to display percentages).

106. Emily Lawler, *'Illegal' teacher strikes common in Michigan long before Detroit Public Schools sick-outs*, MICHIGAN NEWS (Jan. 25, 2016),

the Crestwood School District fired 184 teachers for striking illegally.<sup>107</sup> The teachers challenged their discharge before the Michigan Supreme Court, and lost.<sup>108</sup> In 1974-75, teachers in Hortonville, Wisconsin engaged in one of the bitterest strikes in that state's history.<sup>109</sup> An estimated 240 replacement teachers were used, the strike was defeated, and nearly all the striking teachers lost their jobs.<sup>110</sup> The workers appealed their case to the U.S. Supreme Court on due process grounds, but lost there as well.<sup>111</sup> Unsuccessful illegal strikes by public workers are not limited to teachers, as the experiences of PATCO in 1981 and the New York City Transit Workers in 2005 demonstrate.<sup>112</sup>

In this regard, it is useful to review how states which permit collective bargaining deal with teachers' strikes.

## V. ALTERNATIVES TO STRIKES IN MODERN U.S. PUBLIC SECTOR LABOR LAW

Most states that permit public employees to bargain collectively have alternatives to strikes to resolve bargaining impasses. These procedures "typically involve [some combination of] mediation, fact-finding, and/or interest arbitration."<sup>113</sup>

Mediation involves a neutral third party, with no power to impose contract terms, meeting with the union and employer to try to facilitate an agreement.<sup>114</sup> Mediation is non-binding and is typically most effective when there are other binding procedures that follow if mediation is not successful.<sup>115</sup>

Fact-finding involves a neutral party (or panel) that, literally, finds facts relevant to the bargaining impasse and makes non-binding recommendations, based on those facts and

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[https://www.mlive.com/news/2016/01/illegal\\_teacher\\_strikes\\_common.html](https://www.mlive.com/news/2016/01/illegal_teacher_strikes_common.html)

107. *Id.*

108. See *Rockwell v. Crestwood School Dist. Bd. of Educ.*, 227 N.W.2d 736, 738-40 (Mich. 1975).

109. WISCONSIN HIST. SOC'Y, *Hortonville Teachers' Strike* (last visited June 6, 2019), <https://www.wisconsinhistory.org/Records/Article/CS2486>.

110. *Id.*

111. *Id.*

112. See Greenhouse, *supra* note 19; see also James G. Pope et al., *The Right to Strike*, BOSTON REVIEW (May 22, 2017), <http://bostonreview.net/forum/james-gray-pope-ed-bruno-peter-kellman-right-strike>.

113. HARRIS ET AL., *supra* note 12, at 891.

114. HARRIS ET AL., *supra* note 12, at 891.

115. See HARRIS ET AL., *supra* note 12, at 892.

statutory criteria.<sup>116</sup> The process gives the parties additional information and a more realistic view of their chances at an interest arbitration that often could follow fact-finding.<sup>117</sup> The statutory criteria fact-finders use are typically the same as those interest arbitrators must use.<sup>118</sup> The most common and usually most important factors are analyzing comparable employees, the employer's ability to pay, the interest of the public, and past labor contracts.<sup>119</sup> The fact-finder's recommendations are not binding, but they can be very influential.<sup>120</sup> First, if the process moves beyond fact-finding to interest arbitration, the fact-finder's report and recommendations may be used as evidence in the arbitration hearing.<sup>121</sup> Second, some statutes make it relatively difficult for parties to reject a fact-finders' recommendations.<sup>122</sup>

Interest arbitration is the most common "last resort" mechanism to settle bargaining impasses in public-sector law.<sup>123</sup> It involves a neutral arbitrator, or panel of arbitrators, holding hearings, evaluating relevant evidence, and making decisions that are usually, but not always binding, based on the evidence and the criteria the public-sector statute describes.<sup>124</sup> The arbitration only applies to whatever issues remain at impasse after negotiations and previous steps of the impasse resolution process have ended.<sup>125</sup>

Some states end their impasse dispute procedures without any arbitration or binding decision. For example, Florida, Kansas, and Kentucky use only mediation and fact-finding.<sup>126</sup> Georgia uses only mediation.<sup>127</sup>

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116. HARRIS ET AL., *supra* note 12, at 892.

117. HARRIS ET AL., *supra* note 12, at 892.

118. *See* HARRIS ET AL., *supra* note 12, at 893.

119. HARRIS ET AL., *supra* note 12, at 893.

120. HARRIS ET AL., *supra* note 12, at 892.

121. *See* HARRIS ET AL., *supra* note 12, at 897.

122. *See* HARRIS ET AL., *supra* note 12, at 896-97.

123. *See* HARRIS ET AL., *supra* note 12, at 897.

124. HARRIS ET AL., *supra* note 12, at 897.

125. *SEE* HARRIS ET AL., *supra* note 12, at 891-97.

126. KEARNEY AND MARESCHAL, *supra* note 4, at 269.

127. *Id.*



## VI. REMEDIES FOR ILLEGAL STRIKES

Whether or not the state allows any public-sector employees to strike under any circumstances, state laws routinely contain sanctions against illegal strikes. The law on the books regarding illegal strikes is often quite harsh. There are two main types of remedies for illegal strikes: penalties against individual strikers and penalties against unions.<sup>128</sup> At the most severe end of the scale, the law governing federal employees makes it a *crime* to strike,<sup>129</sup> and a number of the PATCO strikers in 1981 were prosecuted criminally.<sup>130</sup> While this is a minority approach, all the PATCO strikers were also fired and the union PATCO was decertified.<sup>131</sup> Fines against unions and individual workers for illegal strikes are common, and courts routinely enjoin illegal strikes.<sup>132</sup>

### *A. Remedies Against Individual Strikers*

The main penalties against individual employees who strike illegally are usually fines, discipline (up to and including discharge), and limits on future public employment.<sup>133</sup> Ohio's law, for example, authorizes this type of discipline and fines of up to two days' pay for each day on an illegal strike.<sup>134</sup> It also provides that the employee's compensation may not be increased until at least a year after the strike.<sup>135</sup> Other state laws provide similar penalties, with a few variations. Some states penalize one day's wages instead of two,<sup>136</sup> while New York's law requires fines equal to twice the strikers' daily rate of pay for each day on strike in all cases.<sup>137</sup>

As the teachers' strikes of 2018 showed, public employers do

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128. See generally MALIN ET AL., *supra* note 54, at 767-77 (discussing penalties for illegally striking employees and unions striking illegally).

129. See MALIN ET AL., *supra* note 54, at 767.

130. HARRIS ET AL., *supra* note 12, at 885.

131. HARRIS ET AL., *supra* note 12, at 885.

132. See discussion *infra* Part V.A. and Part V.B.

133. See, e.g., N.Y. CIV. SERV. LAW §210(f) (LexisNexis 2018); OHIO REV. CODE ANN. §4117.23 (West 2018); see also Malin et al., *supra* note 54, at 767-68.

134. OHIO REV. CODE ANN. §4117.23.

135. *Id.*

136. See, e.g., DEL. CODE ANN. tit. 19, § 1316(b) (2019)

137. N.Y. CIV. SERV. LAW §210(f).

not always exercise their authority to fire illegal strikers.<sup>138</sup> Employers have both practical and political concerns, especially if they wish to fire most or all teachers in a school district or even state. Thus, when nearly all the public-school teachers in West Virginia went on a (clearly illegal) strike, they were not fired; in fact, they won a raise.<sup>139</sup>

Still, employers have exercised this power specifically against teachers, and courts have given them wide discretion in so doing. In *Hortonville Joint School District v. Hortonville Education Association*<sup>140</sup>, the Supreme Court upheld the discharge of a large number of teachers who struck illegally.<sup>141</sup> The Court rejected a challenge under the Due Process Clause of the Constitution.<sup>142</sup>

### ***B. Remedies Against Unions***

Employers typically file for injunctions against illegal strikes, and, assuming the strike is illegal, courts routinely grant them.<sup>143</sup> While injunctions are equitable remedies, many public-sector labor statutes specify that injunctions are available to employers faced with an illegal strike.<sup>144</sup> Public employers seek such injunctions because they are the quickest way to end a strike, before the normal procedures of civil litigation are exhausted. A few cases have allowed unions to use an “unclean hands” defense to an injunction action, if the employer provoked the strike by failing to bargain in good faith.<sup>145</sup> But few, if any,

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138. See, e.g. Ron Allen & Ethan Sacks, *West Virginia teachers strike ends after governor approves raises*, NBC NEWS (Mar. 6, 2018), <https://www.nbcnews.com/news/us-news/west-virginia-teachers-strike-state-lawmakers-reach-deal-pay-raise-n854021>; Michelle Goldberg, *The Teacher's Revolt in West Virginia*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/opinion/west-virginia-teachers-strike.html>;

139. Allen & Sacks, *supra* note 138; see also Goldberg, *supra* note 138.

140. *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976).

141. *Id.* at 497.

142. *Id.*

143. See MALIN ET AL., *supra* note 54, at 765-66 (discussing the “common availability of injunctive relief” against illegally striking employees).

144. See, e.g., ARIZ. REV. STAT. ANN. § 23-1323 (2018); MICH. COMP. LAWS § 423.202a(9) (2017); WIS. STAT. § 111.70(7m)(a) (2019).

145. See, e.g., *School Dist. No. 351 Oneida County v. Oneida Educ. Ass'n*, 567 P.2d 830, 835 (1977); *School Dist. For City of Holland v. Holland Educ. Ass'n*, 157 N.W.2d 206, 211 (1968).

jurisdictions follow that approach today.<sup>146</sup>

If a union continues to strike after a court issues an injunction ordering the strike to cease, the union is subject to contempt sanctions.<sup>147</sup> Contempt can be civil, with penalties of fines and in some cases it may be criminal, resulting in additional fines and possible jail sentences for at least union officials.<sup>148</sup>

A common rule that can affect teachers' strikes is that, even in states that permit some public employees to strike, strikes which begin as legal strikes may be enjoined if, at some point during the strike, the strike threatens the health, safety, and/or welfare of the public.<sup>149</sup> For example, the Ohio statute provides that if "the public employer believes that a lawful strike creates clear and present danger to the health or safety of the public," it may seek to have the strike enjoined.<sup>150</sup> If the labor board and court agree to the injunction, the parties will also be ordered to resume bargaining with a mediator.<sup>151</sup>

These cases are often difficult for labor boards and courts because of the obvious tension: strikes are meant to cause *some* dislocations and inconveniences, so at what point does an otherwise legal strike create the types of problems that threaten the health, safety, or welfare of the public? In *Armstrong School District v. Armstrong Education Association*<sup>152</sup> the Pennsylvania Supreme Court reversed the appellate court's order and effectively held that cancellation of extracurricular activities, community unrest, and loss of state subsidies if twelve instructional days lost because of a strike could not be made up in thirty-nine remaining days did not justify enjoining a strike that was legal at its inception.<sup>153</sup> In contrast, *Jersey Shore*

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146. In Michigan, a 1994 amendment to the relevant state statute essentially overruled the *Holland* case. See MICH. COMP. LAWS §423.202a(9).

147. HARRIS ET AL., *supra* note 12, at 874.

148. See HARRIS ET AL., *supra* note 12, at 874; see also, e.g., *New York City Transit Auth. v. Transp. Workers Union of Am.*, 822 N.Y.S.2d 579, 581-82 (N.Y. App. Div. 2006) (illustrating fines as a contempt sanction against union).

149. See, e.g., OHIO REV. CODE ANN. § 4117.16(A) (West 2018); 43 PA. STAT. AND CONS. STAT. ANN. § 1101.1003 (West 2019).

150. OHIO REV. CODE ANN. § 4117.16(A).

151. OHIO REV. CODE ANN. § 4117.16(B) (West 2018).

152. *Armstrong School Dist v. Armstrong Educ. Ass'n*, 595 A.2d 1139 (Pa. 1991), *superseded by statute*, 1992 Pa. Laws 403 No. 88, *as recognized in* *Carroll v. Ringgold Educ. Ass'n*, 655 A.2d 613 (Pa. Commw. Ct. 1995).

153. See *id.*; see also *Armstrong Educ. Ass'n v. Armstrong School Dist.*, 542 A.2d 1047, (Pa Commw. Ct. 1988).

*Education Association v. Jersey Shore Area School District*<sup>154</sup> upheld an injunction of an initially legal teachers' strike, stressing that the strike threatened a loss of state subsidies to schools because it could cause a failure to comply with a statutory requirement of providing 180 days of instruction.<sup>155</sup> Illustrating the difficulty of these cases, the decision prompted two separate dissents.<sup>156</sup>

In some states, unions who strike illegally can be denied any rights to "dues check-off" they have under a collective bargaining contract, at least for a certain amount of time.<sup>157</sup> "Dues check-off" means that the employer will automatically deduct the dues individual members of union bargaining units owe to the union that represents them, and forward the money to their union.<sup>158</sup> While the amount of dues employees owe unions is independent of whether dues check-off exists, unions obviously derive a benefit from this form of automatic deduction (as opposed to having to bill members individually).

Some public-sector laws permit decertification of unions that strike illegally.<sup>159</sup> As noted above, PATCO was decertified after its 1981 strike.<sup>160</sup> Florida's statute also specifies that decertification is a potential penalty for an illegal strike.<sup>161</sup>

A minority of states allow private parties who suffered damages because of an illegal public-sector strike to sue the striking union and strikers to recover those damages.<sup>162</sup> For example, *Boyle v. Anderson Firefighters Association Local 1262*<sup>163</sup> held that because a firefighters' strike was illegal, the strikers owed a legal duty to property owners either not to strike

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154. *Jersey Shore Area School Dist. v. Jersey Shore Educ. Ass'n*, 548 A.2d 1202 (N.J. 1988).

155. *Id.* at 1207-08.

156. *See, id.* at 1208-11.

157. *See, e.g.*, FLA. STAT. § 447.507(6)(a)(2) (2019); N.Y. CIV. SERV. LAW § 210(3)(f) (LexisNexis 2010); *see also* *MTA Bus Co. v. Transp. Workers Union of Am.*, 820 N.Y.S.2d 479 (2006) (applying N.Y. CIV. SERV. LAW § 210(3)(f) dues forfeiture penalty).

158. *See Union Dues Checkoff as a Subject in Labor-Management Negotiations: Good Faith Bargaining and NLRB Remedies*, 39(2) FORDHAM L. REV. 299, 300 (1970).

159. *See, e.g.*, FLA. STAT. § 447.507(6)(a)(2)

160. HARRIS ET AL., *supra* note 12, at 885; *see also* MALIN ET AL., *supra* note 54, at 774.

161. FLA. STAT. § 447.507(6)(a)(2); *see also* MALIN ET AL., *supra* note 54, at 774.

162. *See, e.g.*, *Boyle v. Anderson Firefighters Ass'n Local 1262*, 497 N.E.2d 1073 (Ind. Ct. App. 1986).

163. *Id.*

or to fight fires.<sup>164</sup> Thus, strikers could be held individually liable for damages their breach of that duty caused.<sup>165</sup> A majority of states have rejected this type of claim.<sup>166</sup>

The evidence on the effectiveness of sanctions is mixed. Some evidence suggests that harsher strike sanctions do inhibit strikes.<sup>167</sup> The state of Michigan, for example, experienced fewer teacher strikes after the state amended its public-sector statute in the 1990s to enhance penalties for such strikes.<sup>168</sup>

On the other hand, studies have also shown that the best way to avoid public-sector strikes is to provide robust collective-bargaining rights with effective processes for resolving bargaining impasses.<sup>169</sup> In both Ohio and Illinois, the number of public-sector strikes decreased *after* each state passed a law making strikes (and in the case of Ohio, collective bargaining generally) legal for most public employees.<sup>170</sup>

It may seem counter-intuitive that legalizing an activity would decrease the rate of participation in that activity. But, as the 2018 teachers' strikes arguably demonstrate, strikes may be more likely when employees have no other option. In general, strikes are least likely to occur in jurisdictions that provide for compulsory, binding interest arbitration to resolve bargaining disputes.<sup>171</sup>

Also, as the recent teachers' strikes have shown, legal rules are not the only determinative factor in the outcome of strikes. While the PATCO strike was a disaster for the union and the employees, under the very same federal law, eleven years earlier, in 1970, U.S. postal workers engaged in a major work

164. *Id.* at 1081; *see also* HARRIS ET AL., *supra* note 12, at 891.

165. HARRIS ET AL., *supra* note 12, at 891.

166. *See, e.g.* Jackson v. Chicago Firefighters Union, Local No. 2, 513 N.E.2d 1002 (Ill. App. Ct. 1987); White v. Int'l Ass'n of Firefighters, Local 42, 738 S.W.2d 933 (Mo. Ct. App. 1987); Burns Jackson Miller Summit & Spitzer v. Lindner, 451 N.E.2d 459 (N.Y. Ct. App. 1983) (all rejecting tort claims brought by private citizens against illegal strikers).

167. *See* Martin Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J. L. REFORM 313, 328 n. 67 (1993) (citing studies regarding the relationship between strike legalization and strike incidence).

168. *See* Lawler, *supra* note 106 ("In 1994, [Michigan] Public Act 112 placed stricter prohibitions on public school employee strikes specifically. Since that time, strikes have become a rarity in the state.")

169. *See* Malin, *supra* note 167, at 328 n. 67 (citing studies regarding the relationship between strike legalization and strike incidence).

170. Malin, *supra* note 167, at 374-76.

171. KEARNEY & MARESCHAL, *supra* note 4, at 247.

stoppage with fairly positive results.<sup>172</sup> Around 200,000 workers struck, and ultimately the strike was settled with the union receiving increased collective bargaining rights and a significant pay hike.<sup>173</sup>

## VII. CONCLUSION: OPTIONS FOR PUBLIC EMPLOYEES WITHOUT THE RIGHT TO BARGAIN COLLECTIVELY OR STRIKE?

### *A. Modern Public Sector Labor Law Answers*

For employees who lack both the right to strike and the right to bargain collectively, there are no alternatives to strikes. Not surprisingly, employees in states who lack collective bargaining rights generally do worse, in terms of compensation, than similarly-situated employees in states with collective bargaining rights.<sup>174</sup> Again, denying public employees collective bargaining rights violates international norms, as expressed in ILO rules.<sup>175</sup> Indeed, denying many public employees the right to strike may also run afoul of ILO practices.<sup>176</sup> The Committee on Freedom of Association of the ILO determined that the anti-strike provisions of the New York public-sector labor law used against striking transit workers violate international norms.<sup>177</sup> Providing public employees with access to binding interest arbitration as an alternative is more defensible, but the teachers who struck in the spring of 2018 did not have access to any alternative method of resolving bargaining impasses – they didn't even have the right to bargain.

What would a better option for teachers in states like those that experienced strikes in 2018 look like? One could imagine three alternatives. First, adopting the type of broad strike rights that exist for private-sector employees and for most public employees in comparable countries: no need to go through an array of impasse procedures before striking. Second, extending

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172. KEARNEY & MARESCHAL, *supra* note 4, at 243.

173. KEARNEY & MARESCHAL, *supra* note 4, at 243.

174. See, e.g., Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 Cornell J.L. Pub. Pol'y 735 (comparing public employees' robust collective bargaining rights in Illinois with public employees' lack of collective bargaining rights in Virginia).

175. Pope et al., *supra* note 112, at 3.

176. Pope et al., *supra* note 112, at 3.

177. Pope et al., *supra* note 112, at 7 n.26.

to such states the model used in U.S. states that permit some public employees to strike, which generally requires exhausting mediation and/or fact-finding before striking. Third, using interest arbitration instead of strikes as the final way to resolve bargaining impasses.

Unions have traditionally argued in favor of maximizing strike rights. Rationales for this position have ranged from the position that the right to strike is a fundamental right, to the idea that strikes are the most effective way to maximize the power of worker collective action.<sup>178</sup> The problem with this position in this context is that given political realities, this option has essentially no chance of being adopted in the states that experienced the teacher strikes in 2018, or, realistically, in any significant number of states beyond those that currently allow strikes. Further, if it were, given current political realities in the U.S., one could easily see the types of practices that have vitiated the practical power of strikes in the private sector used in the public sector: specifically, the use of permanent replacements.

And yet, interest arbitration has downsides as well. Professor Martin Malin has argued in favor of the right to strike, as opposed to interest arbitration.<sup>179</sup> He argues that fears of unions benefiting inordinately from a too-powerful strike weapon have not been borne out by experience; that interest arbitrators are too wedded to the status quo in fixing contract terms; and that interest arbitration awards do not necessarily reflect the importance of various issues to the parties.<sup>180</sup>

This author would choose the second option: using rules that permit strikes, but under more limited circumstances than in the private sector. In other words, adopt the rules used in states that permit some public employees to strike in all jurisdictions. At the time of this writing though, even that seems fairly unrealistic for the states in question.

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178. For a recent reiteration of these and other arguments, see Pope et al., *supra* note 112.

179. See Malin, *supra* note 167, at 316-335.

180. Malin, *supra* note 167, at 333-34.

### ***B. The Scope of Bargaining Issues***

Even were public-school teachers to gain more robust bargaining rights, or even the right to strike legally, one final problem would remain. Some of the issues the teachers struck over – pay, for example – are classic examples of issues that are negotiable, mandatory subjects of bargaining for teachers' and other unions.<sup>181</sup>

Some of the issues involved in the strikes, however, involve issues that even the most robust public-sector labor laws do not require government bodies to negotiate: most significantly, levels of school funding.<sup>182</sup> It seems even more unrealistic to expect the states that experienced the teachers' strikes in 2018 to require or even tolerate unions regularly negotiating about that topic. Indeed, requiring employers to negotiate with unions on that topic raises a number of serious policy questions beyond the scope of this essay.

Still, the teachers' strikes of 2018 should teach even old hands in the field that unions are capable of surprising and impressive accomplishments. Perhaps these strikes will be a spur to move from a checkered history to a different and brighter future.

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181. For a thorough discussion of the scope of bargaining rules in public-sector labor law, see HARRIS ET AL., *supra* note 12, at 739-92.

182. See, e.g., Erin Johansson, *Collective Bargaining 101* (Mar. 3, 2017), <https://www.jwj.org/collective-bargaining-101>; NAT'L LABOR RELATIONS BD., *Collective Bargaining (Section 8(d) & 8(b)(3))*, <https://www.nlr.gov/rights-we-protect/whats-law/unions/collective-bargaining-section-8d-8b3> (last visited June 11, 2019); Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, 4-8 (Mar. 2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf> (all discussing subjects of collective bargaining agreements, without a single reference to school funding).



